Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1222

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
WILLIAM KANTER
ROBERT K. RASMUSSEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed an action under the Federal Drivers Act, 28 U.S.C. 2679, on the ground that the suit was barred by the statute of limitations, 28 U.S.C. 2401(b), where no federal court action was filed, and no service of process occurred in a state court action, commenced prior to the filing of an administrative claim, until nearly two years after the denial of the administrative claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bialowas v. *United States*, 443 F.2d 1047 (3d Cir. 1971) .. 10
Caton v. *United States*, 495 F.2d 635 (9th Cir. 1974) 13
Celestine v. *Veterans Admin. Hosp.*, 746 F.2d 1360 (8th Cir. 1984) 13
Dyniewicz v. *United States*, 742 F.2d 484 (9th Cir. 1984) . 5
Henderson v. *United States*, 429 F.2d 588 (10th Cir. 1970) 11
Henderson v. *United States*, 785 F.2d 121 (4th Cir. 1986) 9
Kelley v. *United States*, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978) 10
Kubrick v. *United States*, 581 F.2d 1092 (3d Cir. 1978), rev'd, 444 U.S. 111 (1979) 7, 14
Mathews v. *Diaz*, 426 U.S. 67 (1976) 9, 14
McGowan v. *Williams*, 623 F.2d 1239 (7th Cir. 1980) 11
Meeker v. *United States*, 435 F.2d 1219 (8th Cir. 1970) ... 10
Miller v. *United States*, 741 F.2d 148 (7th Cir. 1984) 11
Morano v. *United States Naval Hosp.*, 437 F.2d 1009 (3d Cir. 1971) 13
Reynaud v. *United States*, 259 F. Supp. 945 (W.D. Mo. 1966) 12
Reynolds v. *United States*, 748 F.2d 291 (5th Cir. 1984) .. 13
Robinson v. *United States*, 408 F. Supp. 132 (N.D. Ill. 1976) 12
Rogers v. *United States*, 675 F.2d 123 (6th Cir. 1982) 9
Staple v. *United States*, 740 F.2d 766 (9th Cir. 1984) ...4, 12, 13
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980) 8

Cases—Continued: Page

Washington v. *Breaux*, 782 F.2d 553 (5th Cir. 1986) 9
Whistler v. *United States*, 252 F. Supp. 913 (N.D. Ind. 1966) 12
Wilkinson v. *United States*, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982) 9
Willis v. *United States*, 719 F.2d 608 (2d Cir. 1983) 5
Wollman v. *Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981) 10

Statutes and rule:

Act of Aug. 2, 1946, ch. 753, § 411, 60 Stat. 844 (originally codified at 28 U.S.C. (1946 ed.) 932) 7
Act of July 18, 1966, Pub. L. No. 89-506, § 10, 80 Stat. 308 11
Federal Drivers Act, 28 U.S.C. 2679(b)-(e) 2, 3
28 U.S.C. 2679(b) 4, 5, 6
28 U.S.C. 2679(c) 4
28 U.S.C. 2679(d) 4, 5
Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2528 8
Federal Tort Claims Act:
28 U.S.C. 1346(b) 5
28 U.S.C. 1346 note 7
28 U.S.C. 2401(b) ..... *passim*
28 U.S.C. 2672 5
28 U.S.C. 2674 5
28 U.S.C. 2675(a) 5, 6
28 U.S.C. 2071 7
La. Civ. Code Ann. art. 3463 (West Supp. 1988) 9
La. Code Civ. Proc. Ann. art. 561 (West Supp. 1988) 9
Fed. R. Civ. P.:
Rule 4(a) 8
Rule 4(j) 8, 11, 13

Miscellaneous:

128 Cong. Rec. (daily ed. Dec. 15, 1982):
p. H9850 8
pp. H9850-H9851 8

Miscellaneous – Continued: Page

S. Rep. 1559, 80th Cong., 2d Sess. (1948) 7

S. Rep. 1327, 89th Cong., 2d Sess. (1966) 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1222

ALTON J. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 823 F.2d 896. The opinions of the district court (Pet. App. A23-A43, A47-A59) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1987. A petition for rehearing was denied on September 23, 1987 (Pet. App. A22). The petition for a writ of certiorari was filed as of December 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 27, 1976, petitioner was sitting in a large truck parked on a crowded street in New Orleans. A United

States Postal Service van collided with the mirror of the truck. The truck was undamaged except for a shattered mirror. Pet. App. A1-A2.

On January 27, 1977, exactly one year after the accident, petitioner filed an action in Louisiana court against the United States, the driver of the van, and the Postal Service, alleging personal injuries. He directed the clerk of the court not to serve any of the defendants. On January 17, 1978, just under two years after the accident, petitioner filed an administrative claim with the Postal Service. The agency rejected the claim on April 26, 1978. In the letter informing petitioner of its decision, the Postal Service told petitioner that, if he was not satisfied, he had six months in which to file suit in federal district court. Pet. App. A2.

Petitioner did not file any federal court suit or take any action to effect service in his state court suit within the designated six months. Not until April 23, 1980, almost two years after the denial of petitioner's administrative claim, did petitioner take any action. On that date he served the defendants in the state court suit. The United States removed the case to federal court, and the other defendants were dismissed. Pet. App. A3-A4, A48-A49, A53-A54.

The United States then moved to dismiss the case because petitioner had failed to comply with the statute of limitations of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), which requires suit to be brought within six months of administrative denial and which applies to claims brought under the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), based on injuries allegedly caused by federally employed drivers. The district court denied the motion. Although it was, and is, uncontested that petitioner did not file a federal court action within six months of the

denial of his administrative claim, the court reasoned that "[petitioner's] state action was pending * * * and * * * that filing * * * toll[ed] the statute of limitations for the Federal Drivers Act" (Pet. App. A54). After a three-day bench trial, petitioner was awarded $121,887.20 in damages (*id.* at A2-A3, A43).

The court of appeals reversed (Pet. App. A1-A21). It ruled first that "[Federal Drivers Act] claims are subject to the administrative exhaustion requirements and limitations periods of the FTCA" (*id.* at A9), at least where, as here, the plaintiff knew that the injury-causing driver was a federal government employee acting within the scope of his employment (id. at A13-A15). The court then concluded that, while petitioner complied with Section 2401(b)'s requirement that he file an administrative claim within two years of his accident, he did not comply with the same provision's requirement that suit be begun within six months of denial of the administrative claim. The court stated (Pet. App. A17): "Halfway compliance with section 2401(b) is not enough." Petitioner simply "did nothing between the time that the [Postal Service] denied his claim and the expiration of the six-month limitations period" (*ibid.*). The court explained that, while some state court suits in some circumstances might effectively toll the limitations statute, petitioner's filing of a state court action prior to making an administrative claim or having it denied did not do so: no defendant was in fact served in the state court suit within the six-month period following exhaustion; and at least without a timely post-exhaustion amendment, the pre-exhaustion filing of the state court suit could not be treated as having initiated an FTCA action because, until denial of the administrative claim, there could be no jurisdiction over such a suit (*id.* at A17-A21). The court therefore held petitioner's action untimely and ordered that the case be dismissed for want of jurisdiction.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Although there is some disagreement in the reasoning of several appellate courts on related issues, none of those courts has indicated that a plaintiff who is aware that the driver is a federal employee, and therefore files an administrative claim, may wait two years following the denial of his adminstrative claim before serving process in a lawsuit filed prior to the administrative claim. Only one decision, *Staple* v. *United States*, 740 F.2d 766 (9th Cir. 1984), involved a situation where service in a lawsuit was not effected until after the six-month limitations period of 28 U.S.C. 2401(b) had expired. Although we think that decision is incorrect in allowing service to be effected 12 months after denial of the administrative claim, its factual differences make much less stark any actual conflict of holdings, and we suggest that the issue does not warrant this Court's review at the present time.

1. The Federal Drivers Act makes the Federal Tort Claims Act the exclusive remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment" (28 U.S.C. 2679(b)). When a suit is filed in any court against a government employee alleging such injuries, the employee is required to notify his superior, who in turn must "promptly" inform the appropriate United States Attorney, the Attorney General, and the head of the employing federal agency (28 U.S.C. 2679(c)). If the Attorney General certifies that the employee was acting within the scope of his employment when the incident at issue occurred, the case "shall be removed" to the appropriate federal district court (28 U.S.C. 2679(d)) and shall be "deemed a tort action brought

against the United States under the provisions of [the FTCA]" (*ibid.*).

The FTCA in turn provides for a federal court action against the United States for certain torts of its employees (28 U.S.C. 1346(b), 2674). Such an action "shall not be instituted" against the United States, however, unless the claim has been presented to, and denied by, the federal agency that employed the person who committed the alleged tort (28 U.S.C. 2675(a)). (The agency and the Attorney General have the authority to settle such claims (28 U.S.C. 2672).) The FTCA's statute of limitations, 28 U.S.C. 2401(b), requires, first, that the claim be presented to the agency within two years of its accrual and, second, that suit against the United States be commenced no later than six months after the agency's denial of the claim. See *Willis* v. *United States*, 719 F.2d 608, 612 (2d Cir. 1983); *Dyniewicz* v. *United States*, 742 F.2d 484, 485 (9th Cir. 1984).

As the court of appeals correctly held (Pet. App. A4-A15), the administrative claim requirement and the limitations periods of Section 2401(b) apply with full force to suits brought under the Federal Drivers Act, at least where there is no doubt that the plaintiff knew or had reason to believe from the outset that the driver was a government employee acting as such. The Federal Drivers Act states that a tort suit against the driver shall be "deemed a tort action" under the FTCA once the employee is certified as having acted within the scope of his employment (28 U.S.C. 2679(d)). It also states that the FTCA remedies under 28 U.S.C. 1346(b) (FTCA jurisdiction) and 28 U.S.C. 2672 (administrative settlement) are the exclusive remedies against the United States for driver-based torts (28 U.S.C. 2679(b)). Moreover, as the court of appeals explained (Pet. App. A4-A9), the FTCA's mandatory administrative claim procedure (28 U.S.C. 2401(b),

2675(a)), enacted in 1966, is designed to reduce congestion in the courts by providing the government a chance to settle claims prior to any litigation and insisting on prompt litigation after denial of an administrative claim. See, *e.g.*, S. Rep. 1327, 89th Cong., 2d Sess. 2-5 (1966). Exemption of Federal Drivers Act claims would seriously undermine those objectives.

Congress intended no such exemption. The 1966 law that created the current version of Section 2401(b) also amended the Federal Drivers Act, by adding the reference in 28 U.S.C. 2679(b) to agency settlement authority, specifically to "make it conform" with the new administrative claim and limitations provisions (S. Rep. 1327, *supra,* at 8). And the congressional committee reports on the 1966 legislation expressly point to the use of motor vehicles by government agencies, including the Post Office, as a principal cause of the large number of tort claims that were the object of congressional concern in the 1966 legislation (*id.* at 5 (quoting House committee report)).

In addition to correctly holding Section 2401(b) applicable to this case, the court of appeals also correctly held (Pet. App. A16-A17) that petitioner failed to comply with the requirements of that provision. In particular, petitioner failed to comply with the express requirement of Section 2401(b) that an action be "begun within six months * * * of notice of final denial of the claim by the agency." The suit was commenced before the administrative claim was even filed, and in that respect failed to comply not only with Section 2401(b), but with the commandment of 28 U.S.C. 2675(a) that suit "shall not be instituted" until after an administrative claim has been presented and denied. Moreover, no action of any sort was taken to

reinitiate the state court suit until process was served for the first time "*almost two years* after the administrative denial" (Pet. App. A17 (emphasis in original)). During that period, the suit simply did not exist, as far as the driver, the Postal Service, and the United States were concerned.

Like other statutes of limitations, Section 2401(b) represents a congressional "judgment that it is unjust to fail to put the adversary on notice to defend within [the] specified period of time." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). Although a timely filed state court suit that is served with reasonable promptness could satisfy that section's limitations requirement, a lawsuit like petitioner's that is not served on any defendant until 18 months after the limitations period has run cannot constitute a filing that tolls the limitations period applicable to the United States. To conclude otherwise would be incompatible with the concern apparent throughout the FTCA that tort claims against the United States be resolved promptly. The administrative claim process and (if necessary) subsequent lawsuit are both to be commenced within relatively strict time limitations, and those requirements are difficult to reconcile with the absence of any limitation on service of the lawsuit.

Further, a requirement of prompt service has long been implicit in the FTCA limitations provision. Under the Federal Rules of Civil Procedure, which apply to all "civil actions" in federal court by virtue of 28 U.S.C. 2071,[1] the

---

[1] The FTCA, as originally enacted, expressly stated that all FTCA actions would be in accordance with the Federal Rules of Civil Procedure. Act of Aug 2, 1946, ch. 753, § 411, 60 Stat. 844 (originally codified at 28 U.S.C. (1946 ed.) 932). When Title 28 of the United States Code was revised in 1948, the provision was deleted (see 28 U.S.C. 1346 note), but only because Congress thought it redundant. S. Rep. 1559, 80th Cong., 2d Sess. 11-12 (1948).

plaintiff is responsible for ensuring "prompt service" (Rule 4(a)), and absent a showing of good cause, complaints not served within 120 days are to be dismissed without prejudice upon the court's own initiative (Rule 4(j)).[2] While those particular provisions were not in effect at the time this case arose, service of federal court complaints was at that time generally effected by United States marshals, and that procedure was understood to provide for reasonably prompt service. 128 Cong. Rec. H9850 (daily ed. Dec. 15, 1982). Thus, when Congress established the six-month limitations period for FTCA actions in Section 2401(b), it plainly did not contemplate that legally effective notice to the United States—and hence the beginning of litigation of the claim, from the government's point of view—could be delayed far beyond the term specified by the statute.[3]

2. Petitioner offers no statutory analysis to challenge the correctness of the court of appeals' decision. Rather,

---

[2] At the time Congress added subdivision (j) to Fed. R. Civ. P. 4, providing for dismissal without prejudice of an action in which service is not effected within 120 days, Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2528, it made clear that, if service has not been effected and the plaintiff has not made reasonable efforts at service, the filing of the suit does not toll the statute of limitations. See 128 Cong. Rec. H9850-H9851 (daily ed. Dec. 15, 1982).

[3] This Court has recognized that limitations on time for service play an important role in accomplishing the objectives of a statute of limitations. In *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980), where the Court applied a state statute of limitations in a diversity action, it concluded that it should also apply a state law requiring as a precondition to tolling of the statute of limitations that the complaint be served as well as filed. The Court pointed out (*id.* at 751): "The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt

he contends (Pet. 10-21) that the decision is inconsistent with a number of decisions of other courts of appeals and of district courts involving alleged torts by federal drivers. He also argues (Pet. 21-31) that the decision below is contrary to this Court's decision in *Mathews* v. *Diaz*, 426 U.S. 67 (1976). Finally, he contends (Pet. 31-41) that the decision will require plaintiffs in petitioner's position to file two lawsuits—one against the driver, another against the United States. None of those arguments shows the decision of the court of appeals to be incorrect or supports a grant of the petition.

a. With the single exception of the Ninth Circuit's *Staple* decision, the decisions of the courts of appeals firmly support the holding of the court below in this case. Those courts have routinely held—and there is no substantial question—that actions brought under the Federal Drivers Act and removed to federal court as actions against the United States are subject to the FTCA's administrative claim and limitations requirements. See Pet. App. A9-A14; *Henderson* v. *United States*, 785 F.2d 121, 123 (4th Cir. 1986); *Wilkinson* v. *United States*, 677 F.2d 998, 1000 (4th Cir.), cert. denied, 459 U.S. 906 (1982); *Rogers* v. *United States*, 675 F.2d 123, 124 (6th Cir. 1982);

---

to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute."

It follows, in the context of the FTCA, which has its own statute of limitations, that the provisions of federal law for reasonably diligent and prompt service should likewise be applicable. A contrary conclusion would result in the application of no limitation at all on service of process or, if Louisiana law were somehow found applicable, allowance of five years in which to serve the state court action before the statute of limitations would begin to run again. La. Civ. Code Ann. art. 3463 (West Supp. 1988); La. Code Civ. Proc. Ann. art. 561 (West Supp. 1988); *Washington* v. *Breaux*, 782 F.2d 553 (5th Cir. 1986).

Wollman v. *Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981); *Bialowas* v. *United States*, 443 F.2d 1047, 1049 (3d Cir. 1971); *Meeker* v. *United States*, 435 F.2d 1219, 1222 (8th Cir. 1970). Thus, as petitioner all but concedes (Pet. 16-18), plaintiffs must file an administrative claim as a prerequisite to pursuit of any court action under the Federal Drivers Act.[4] And following denial of such a claim, they must comply with the requirement of Section 2401(b) that the action be begun within six months.

Petitioner offers extensive authority for a proposition on which this case does not turn—that a suit filed in state court can, under some circumstances, toll the running of the FTCA limitations period. With one exception,

---

[4] Petitioner nonetheless purports to rely on *Kelley* v. *United States*, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978), where the court allowed a suit that was originally brought in state court against the driver to proceed against the United States under the Federal Drivers Act even though an administrative claim had not been filed. No other court of appeals in the ten years since *Kelley* has followed that ruling, and we believe that it is incorrect. In any event, the issue of compliance with the administrative claim requirement is not presented in this case, since all agree that a timely claim was filed. The problem here is a failure to proceed with timely service process in the lawsuit following denial of the claim, so as to accomplish the notification purposes of Section 2401(b) that the Second Circuit found fulfilled in *Kelley*. Because it involved no administrative claim at all, *Kelley* necessarily failed to address the question of what the statute requires following denial of such a claim.

Even if *Kelley* were correct and the administrative claim requirement were in issue here, that case is plainly distinguishable from this one because, as the Fifth Circuit here noted (Pet. App. A13) and the *Kelley* court itself stressed (568 F.2d at 261-262), the plaintiffs there were unaware—through the fault of the driver and the government—that the driver was a federal employee acting within the scope of his employment.

however, the decisions cited present no instance of delay in filing or service of the lawsuit, such as that on which the decision below rested. Those decisions are fully consistent with the holding of the court below that a pre-claim state court suit that was not served for two years after denial of the claim "did not begin an action under section 2401(b)" (Pet. App. A19).

In *Henderson* v. *United States,* 429 F.2d 588 (10th Cir. 1970), where there was no administrative claim requirement because the case arose before the effective date of the 1966 amendments to 28 U.S.C. 2401(b),[5] a timely filed state court suit against the driver tolled the then-applicable statute of limitations. The decision does not mention any assertion of delay in either the filing or service of the suit. In *McGowan* v. *Williams,* 623 F.2d 1239 (7th Cir. 1980), the state court suit against the driver was filed within six months of the denial of the administrative claim, was promptly served on the driver, and was brought to the attention of the United States Attorney.[6] See Pet. App. A18-A19. And in *Miller* v. *United States,* 741 F.2d 148 (7th Cir. 1984), within six months of the constructive denial of plaintiff's timely administrative claim, the plain-

---

[5] The claim in *Henderson* arose in December 1966 (429 F.2d at 589). The 1966 amendment to 28 U.S.C. 2401(b) applies only to claims that accrued after January 18, 1967. Act of July 18, 1966, Pub. L. No. 89-506, § 10, 80 Stat. 308. The 1966 amendment not only added the administrative claim requirement but, as we have shown (see pages 5-6, *supra*), made clear Congress's intent that the requirements of Section 2401(b) apply to Federal Drivers Act suits.

[6] The United States Attorney entered an appearance and sought removal of the suit three months after it was filed. The federal policy of prompt legally effective notice to the federal government (see pages 7-8, *supra*) was plainly satisfied. Cf. Fed. R. Civ. P. 4(j) (service must occur within 120 days).

tiff filed and the United States removed a state court action against the driver.[7]

The Ninth Circuit's decision in *Staple* v. *United States, supra,* like this case and unlike all of the other decisions relied on by petitioner, involved a plaintiff who delayed service in a state court suit following denial of an administrative claim. Two months after the accident at issue, the plaintiff filed a state court action against, but did not serve, the government driver. She then filed a timely administrative claim, which the agency denied. Within six months, the plaintiff filed suit in federal court; but because she failed to name the United States, that suit was dismissed, and she did not appeal the dismissal. Not until one year after the administrative denial did the plaintiff serve her state court suit, which was then removed by the United States. 740 F.2d at 768. The court of appeals held, first, that administrative exhaustion need occur only before removal (not before the filing of the state court suit) and, second, that the plaintiff's state court filing tolled the running of the statute of limitations against the United States (*id.* at 769-770).

---

[7] Similarly, none of the three district court decisions cited by petitioner (Pet. 14) is contrary to the result reached by the court of appeals here. In *Robinson* v. *United States,* 408 F. Supp. 132 (N.D. Ill. 1976), the state court suit may have been filed after the administrative denial, but even if it was filed before the denial, there is no indication that the complaint was not amended to reflect the denial or that the suit was not promptly served on the driver and brought to the attention of the United States. In *Whistler* v. *United States,* 252 F. Supp. 913 (N.D. Ind. 1966), which was decided before the 1966 amendment to the applicable statute of limitations (*i.e.,* before the administrative claim requirement was added), the state court suit against the driver was brought within two years of the accident, promptly served, and removed by the United States within one month. In *Reynaud* v. *United States,* 259 F. Supp. 945 (W.D. Mo. 1966), also governed by the pre-1967 law, the suit was held to be out-of-time.

We agree with the court of appeals in this case (Pet. App. A10-A12) that the *Staple* decision is incorrect and that it is in substantial tension, if not outright conflict, with the decision in this case. Nevertheless, we do not think that this Court's review is warranted here. Although the two courts took different views of the statutory requirements that a plaintiff must meet, the factual differences between the two cases make any actual conflict much less stark than it may at first appear. The plaintiff in *Staple*, unlike petitioner, did file suit against the federal government (although she named the wrong party) within six months after the administrative denial. And the state court suit in *Staple* was served roughly six months, not 18 months (as here), after the time for filing suit had run. It is arguable—especially in view of the timely (but defective) federal court suit—that the service in the state court suit just over six months after the proper filing date should be found sufficiently prompt to meet the requirements of 28 U.S.C. 2401(b) in effect at that time, prior to the amendment of the Federal Rules setting a presumptive limit on service of 120 days (Fed. R. Civ. P. 4(j)). No similar argument is available here, where no suit was filed within the allowed time, and service was not effected until roughly 18 months after the time for filing had passed.[8]

In any event, insofar as a conflict does exist between the Fifth and Ninth Circuits, the situation that gives rise to the conflict arises so rarely that this Court's review is not called for—certainly not in a case, like this, were the correct result is manifest. For the situation to arise, a plaintiff must know that he was injured by a government employee acting as such, must file a premature state lawsuit against

---

[8] We also note that, while petitioner did not effect service in any suit until more than four years after the accident, service on the driver in *Staple* was effected only 19 months after the accident and certification by the Attorney General less than two years after the accident.

the individual employee but direct that it not be served, must file an administrative claim within two years of the accident, and, after its denial, must then fail both to serve the state suit promptly and to file a federal court action directly against the United States within six months. Such plaintiffs, who are routinely informed of the time for filing suit in the denial letter sent by the agency, are well aware of the FTCA's six-month statute of limitations; they simply fail to comply with it. That this case and *Staple* are the only two cases presenting this fact pattern, although the current version of the FTCA's statute of limitations has existed for over 20 years, confirms that these cases are few and far between.

b. Petitioner argues (Pet. 21-31) that his premature state court suit (filed before administrative exhaustion) should have been held sufficient because the prematurity may be cured by an amendment. That argument is unsupportable in circumstances like those presented in this case. We agree that a pre-exhaustion suit may be rendered effective if it is amended within the six months following denial of the administrative claim and served in a timely manner.[9] Certainly, however, no such cure is effected by complete inaction for two years following the administrative denial. See *Reynolds* v. *United States*, 748 F.2d 291 (5th Cir. 1984); *Caton* v. *United States*, 495 F.2d 635, 638 (9th Cir. 1974); *Morano* v. *United States Naval Hosp.*, 437 F.2d 1009, 1011 (3d Cir. 1971).[10]

---

[9] The court of appeals explicitly reserved judgment on whether and under what circumstances such a premature suit might be rendered effective by amendment or other action taken during the period following denial of the administrative claim (Pet. App. A19-A20 n.5).

[10] In *Celestine* v. *Veterans Admin. Hosp.*, 746 F.2d 1360 (8th Cir. 1984), although the plaintiff did not formally amend his pending lawsuit after his administrative claim was denied, the court of appeals

Petitioner's reliance on *Mathews* v. *Diaz, supra*, is misplaced. The Court there merely held that when a plaintiff exhausts his administrative remedies during the course of a pending suit, and informs the court of that fact, the notice should be treated as a supplemental complaint (426 U.S. at 75). Nothing in *Mathews* suggests that, where no court is informed of the required administrative exhaustion and no defendant is informed of the lawsuit until long after the statute of limitations has run, a time-barred claim can be revived. See *ibid.* (footnote omitted) ("[a] supplemental complaint in the District Court would have eliminated th[e] jurisdictional issue").

c. Finally, petitioner suggests (Pet. 31-41) that his suit should be allowed because individuals injured by government drivers, not knowing whether the driver was acting within the scope of his employment, should not have to file two suits – one in state court against the driver and one in federal court against the United States. That concern plainly underlies some of the decisions discussed above concerning the sufficiency in some circumstances of a single state court suit against the driver. But the concern has no application to petitioner. He was aware that the driver was acting within the scope of his federal employment (Pet. App. A13-A14), and thus he did not face the hypothetical dilemma posed by petitioner. Any injured party who has reason to think the driver was acting for the government has a ready means for protecting his claim by

---

held that, because the United States had moved to dismiss the lawsuit and knew that the claim was denied, the district court had effectively been informed of the denial of the administrative claim. In *Kubrick* v. *United States*, 581 F.2d 1092, 1098 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), the court stated that no refiling or amendment was necessary because no substantial action had taken place in the case; the United States did not contend otherwise and clearly had previously had notice of the suit.

the filing of a single suit against the driver, subsequent amendment of the action to reflect the government agency's denial of the required administrative claim, and service of the amended suit on the driver within six months of the agency's action.

Even were it relevant here, the dual-suit problem raised by petitioner would offer no excuse for ignoring the FTCA limitations provision. Any potential FTCA plaintiff, not just those covered by the Federal Drivers Act, may have some question about whether the injury-causing government employee was acting within the scope of his employment. Congress undeniably wanted even such plaintiffs to comply with the FTCA's statute of limitations if they are to recover against the United States. Thus, when an injured party has some reason to believe that the tortfeasor was acting within the scope of government employment, he must, to obtain a judgment against the United States, take steps to comply with the requirements of 28 U.S.C. 2401(b), which are not discretionary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

WILLIAM KANTER
ROBERT K. RASMUSSEN
Attorneys

MARCH 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60364